T-3101-26

ID 1

Seal

Court File No.

FEDERAL COURT
COUR FÉDÉRALE
FILED / DÉPOSÉ
JUL 08 2026
RUDI HWANG
VANCOUVER, BC 1

FEDERAL COURT

BETWEEN:

TSLEIL-WAUTUTH NATION

Applicant

and

ATTORNEY GENERAL OF CANADA and
VANCOUVER FRASER PORT AUTHORITY

Respondents

APPLICATION UNDER SECTION 18.1(1) OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date JUL 08 2026 Issued by ORIGINAL SIGNED BY RUDI HWANG REGISTRY OFFICER AGENT DU GREFFE A SIGNÉ L'ORIGINAL
(Registry Officer)

Address of local office: Pacific Centre
P.O. Box 10065
701 West Georgia Street
Vancouver BC V7Y 1B6

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice
840 Howe Street, Suite 900
Vancouver BC V6Z 2S9

AND TO: **VANCOUVER FRASER PORT AUTHORITY**
100 The Pointe, 999 Canada Place
Vancouver BC V6C 3T4

APPLICATION

1. This is an application for judicial review of Project and Environmental Review Permit 25-095 ("**Permit**"). The Permit was issued by the Vancouver Fraser Port Authority ("**VFPA**") on June 23, 2026 pursuant to s. 27(2) of the *Port Authorities Operations Regulations*, SOR/2000-55, which was promulgated under the *Canada Marine Act*, SC 1998, c 10.

2. The VFPA, in its capacity as a regulator, issued the Permit to another branch of the VFPA, who is also the proponent. The Permit authorizes the VFPA-as-proponent to:

(a) dredge approximately 25,000 cubic metres from the edges of a deep-sea navigation channel located east of the Iron Workers Memorial Bridge in Eastern Burrard Inlet, Vancouver, B.C.;

(b) remove sections of decommissioned waterlines within the proposed dredging areas; and

(c) install two new aids to navigation;

(collectively, the "**Second Narrows Dredging Works**").

THE APPLICANT MAKES APPLICATION FOR:

3. The Permit to be quashed on either or both of the following two independent grounds:

(a) the Crown in Right of Canada ("**Canada**") failed to discharge the duty to consult Tsleil-Waututh Nation ("**Tsleil-Waututh**") before the VFPA issued the Permit, and breached the honour of the Crown in so doing; and

(b) the VFPA's decision to issue the Permit was based on an unreasonable determination that the Second Narrows Dredging

Works are not likely to result in significant adverse environmental effects under the *Impact Assessment Act*, SC 2019, c 28, s 1.

4. Alternatively, a declaration that the Crown failed to discharge its duty to consult Tsleil-Waututh before the VFPA issued the Permit, and breached the honour of the Crown in so doing.

5. An interlocutory injunction prohibiting the Second Narrows Dredging Works until the disposition of this application.

6. The costs of this application in favour of Tsleil-Waututh.

7. Further relief as counsel may advise and this Court may permit.

THE GROUNDS FOR THIS APPLICATION ARE:

(a) The Parties

8. The applicant, Tsleil-Waututh, is a Coast Salish Nation and one of the "aboriginal peoples of Canada" within the meaning of s. 35 of the *Constitution Act, 1982*. It is also a "band" within the meaning of the *Indian Act*.

9. The Tsleil-Waututh language is hən̓q̓əmin̓əm̓, which is a dialect of Halkomelem. In hən̓q̓əmin̓əm̓, "Tsleil-Waututh" is known as səlilwətaɬ and means "People of the Inlet." This name reflects Tsleil-Waututh's deep geographic, physical, cultural, and spiritual connection with Burrard Inlet – where the Permit authorizes the Second Narrows Dredging Works to occur.

10. Tsleil-Waututh territory extends approximately from the vicinity of what are currently referred to as Mount Garibaldi to the north, the 49th parallel and beyond to the south, west to Gibsons, and east to Coquitlam Lake ("**Territory**"). Tsleil-Waututh's members continue to live in, care for, and harvest resources in the Territory. Tsleil-Waututh's primary community is located on the Burrard Inlet 3 Reserve, located on the north shore of the eastern portion of Burrard

Inlet—known as səlilwət in hən̓q̓əmin̓əm̓—just to the northeast of the Second Narrows Dredging Works.

11. The map at Figure 1 shows the area where Tsleil-Waututh requires consultation to assess potential impacts of proposed resource developments on its Aboriginal title, rights, culture, and way of life, along with the approximate location of the Second Narrows Dredging Works marked with a red arrow:

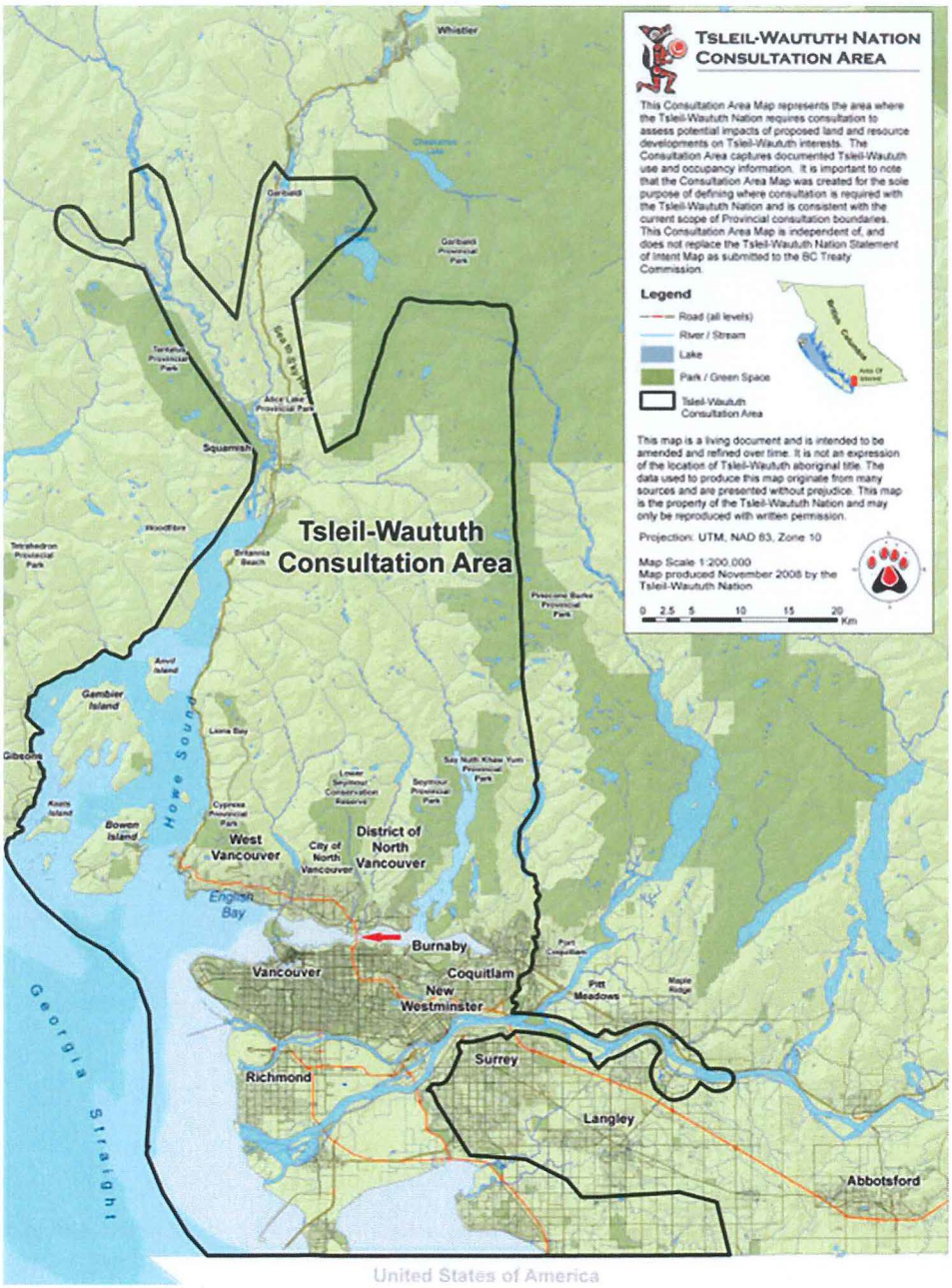

Figure 1 Tsleil-Waututh Consultation Area and Second Narrows Dredging Works

12. Tsleil-Waututh has a strong claim to Aboriginal title and rights in its Territory, particularly within eastern Burrard Inlet. Tsleil-Waututh members and their ancestors have used and stewarded the lands, waters, and resources of the Territory since time out of mind.

13. Canada is aware of the very serious cumulative effects present in Burrard Inlet and the corresponding impacts to Tsleil-Waututh's Aboriginal title, rights, culture, and way of life. Put simply, the cumulative impacts of colonial and industrial development in and around Burrard Inlet have led to a situation where Tsleil-Waututh members are no longer able to: (i) meaningfully exercise their right to harvest many culturally important species from the lands and waters in the Territory; or (ii) safely use and access Burrard Inlet for cultural and subsistence purposes.

14. The map at Figure 2, from the VFPA's Permit materials, depicts:

(a) the Second Narrows Dredging Works (white polygons in the centre of Burrard Inlet); and

(b) the location of Tsleil-Waututh's Burrard Inlet 3 Reserve (dark orange polygon labelled as "Tsleil-Waututh Nation Reserve"):

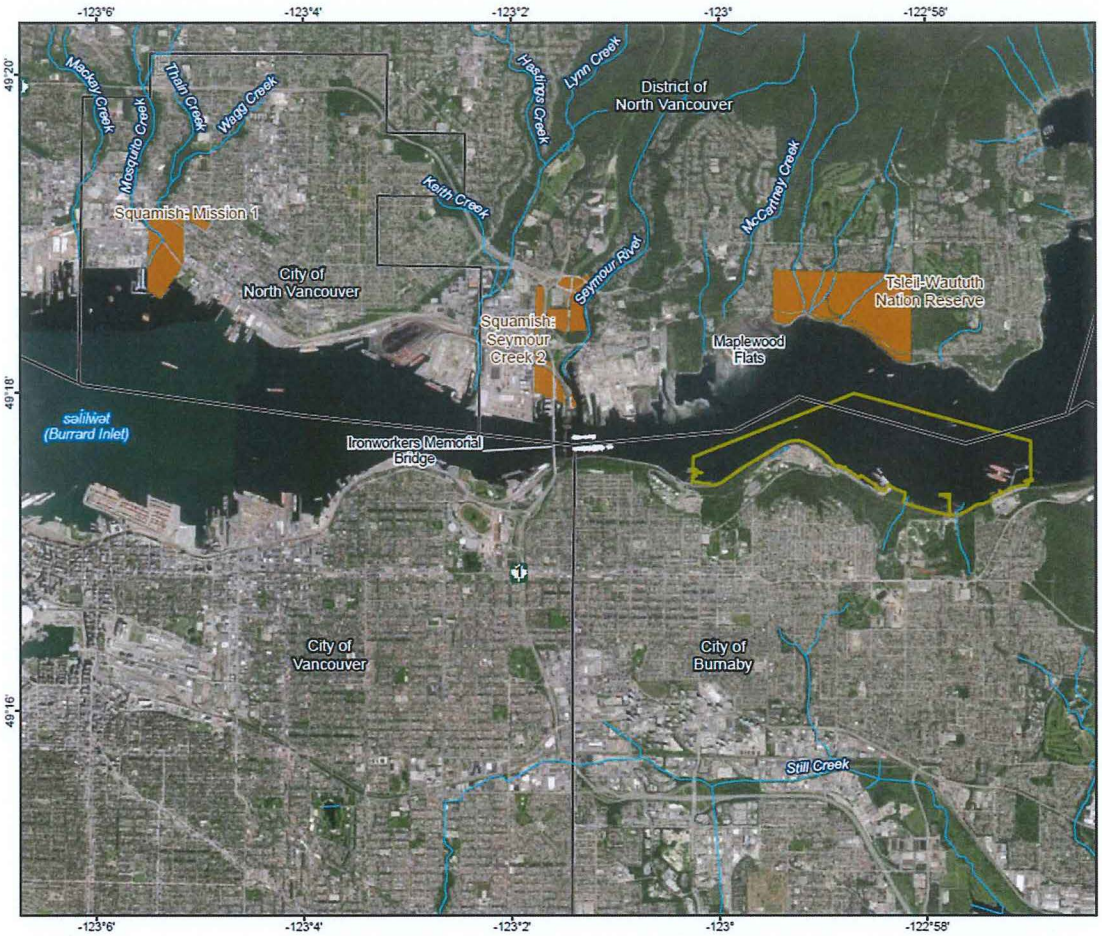

Figure 2 Second Narrows Dredging Works

15. The respondents are the Attorney General of Canada, pursuant to Rule 303(1) of the *Federal Courts Rules*, SOR/98-106 and the VFPA in its capacity as proponent of the Second Narrows Dredging Works.

16. Under s. 27 of the *Port Authorities Operations Regulations*, SOR/2000-55 (which directs that "[a] port authority may give a written authorization under this section" to conduct various kinds of physical works within the area of a port), the VFPA also acted as the statutory decision-maker in issuing the Permit to itself. Further, the VFPA-as-proponent also carried out various procedural aspects of the Crown's duty to consult. In this regulatory process, the VFPA sits in the roles of both proponent and decision-maker.

17. In its capacity as decision-maker, the VFPA is also a "federal authority" under the *Impact Assessment Act*, SC 2019, c 28, s 1. In addition to the

requirements of the *Port Authorities Operations Regulations*, under s. 82 of the *Impact Assessment Act*, the VFPA could not lawfully issue the Permit unless:

(a) the VFPA determined that the Second Narrows Dredging Works were not likely to cause significant adverse environmental effects; or

(b) the Governor in Council decided that any significant adverse environmental effects likely to be caused by the Second Narrows Dredging Works were justified in the circumstances.

(b) The purpose of the Second Narrows Dredging Works

18. The issuance of the Permit is part of a suite of at least five regulatory processes currently contemplated, or just recently concluded, which will, individually and collectively, result in significant changes to marine shipping transiting through the Salish Sea and Burrard Inlet, including by increasing the volume of oil being transported and changing oil tanker traffic transiting to and from Trans Mountain Corporation's ("**Trans Mountain**") Westridge Marine Terminal:

(a) the VFPA's Berry Point Traffic Control Zone 2 and 3 Range Light Installation (issued in Fall 2025);

(b) the issuance of the Permit for the Second Narrows Dredging Works (issued June 23, 2026 and challenged in this proceeding);

(c) the issuance of an authorization under the *Fisheries Act* related to the Second Narrows Dredging Works (issued June 23, 2026, and which will be challenged by Tsleil-Waututh in a separate application for judicial review before this Court);

(d) an authorization under the *Canada Energy Regulator Act* to allow Trans Mountain to add "drag-reducing agents" to the Trans

Mountain Pipeline, which will increase pipeline throughput by approximately 10% (issued June 5, 2026); and

(e) Trans Mountain's proposal to add pump capacity and otherwise optimize the Trans Mountain Pipeline (regulatory process not yet started);

(collectively, the "**Proposed Initiatives**").

19. These regulatory processes (i.e. the Proposed Initiatives) are being pursued to advance one of the goals the Government of Canada recently stated in the *Canada-British Columbia Cooperative Prosperity Agreement* (July 2, 2026): "optimising the Trans Mountain Pipeline System to increase pipeline throughput from 890,000 barrels per day to 1,190,000 barrels per day, including the use of drag-reducing agents, and mainline optimisation." Collectively, the Proposed Initiatives will result in an increase of 300,000 barrels per day through Trans Mountain's pipeline system. In correspondence from Trans Mountain in September 2025, Tsleil-Waututh received notice that Trans Mountain intends to increase throughput by more than 360,000 barrels per day.

20. The VFPA's Berry Point Traffic Control Zone 2 and 3 Range Light Installation was the first of the Proposed Initiatives to be advanced. The VFPA sent engagement materials to Tsleil-Waututh about the Range Light Installation periodically from 2023 to 2025, and sought Tsleil-Waututh's views only on narrow technical matters concerning potential impacts to Tsleil-Waututh from the physical construction of the Range Light structures themselves. Over two years into consultation, and only after multiple direct requests from Tsleil-Waututh, the VFPA shared for the first time in July 2025 that: (i) the actual strategic purpose of the Range Light Installation is to enable the nighttime transit of empty eastbound oil tankers through eastern Burrard Inlet toward Westridge Marine Terminal (a terminus of the Trans Mountain Pipeline System); and (ii) there are no beneficiaries of the Range Light Installation other than those oil tankers. Tsleil-Waututh objected to this late disclosure and

requested that the VFPA consult Tsleil-Waututh on this issue. The VFPA rejected that request, maintained its position that the only matters for consultation were the physical impacts of construction, and approved the Range Light Installation. This pattern continued in relation to the Permit that is being challenged in this proceeding.

21. The second and third Proposed Initiatives are those respecting the Second Narrows Dredging Works (including the Permit that is the target of this proceeding).

22. Currently, oil tankers calling at Westridge Marine Terminal are limited to filling up to approximately 80% of their overall capacity. That is because the sea floor of Burrard Inlet near the Second Narrows Bridge is too shallow to allow tankers to transit with full loads of oil. This limitation is reflected in vessel draft restrictions – restrictions on how far below the waterline a vessel can sit – for the Second Narrows area of Burrard Inlet. These restrictions are set by the VFPA in a document called the Port Information Guide, a tool under the *Canada Marine Act*, SC 1998, c 10 which provides guidance to those in control of vessels. Within the Port Information Guide, the Second Narrows area, which is the subject of these draft restrictions, is known as Traffic Control Zone 2 or TCZ-2.

23. The stated purpose of the Second Narrows Dredging Works, according to the Permit, is to "improve shipping efficiency in Burrard Inlet's Second Narrows waterway, including facilitating the potential for vessels calling at Trans Mountain's Westridge Marine Terminal to more fully load." This is shorthand for the idea that conducting the Second Narrows Dredging Works will allow fully loaded oil tankers to comply with the draft restrictions in Traffic Control Zone 2, facilitating: (i) the passage through Traffic Control Zone 2 of fully-loaded tankers from Westridge Marine Terminal; and (ii) the ability of vessels to call and more fully load at various other shipping terminals east of the Second Narrows Bridge, in addition to Westridge Marine Terminal.

24. After the Second Narrows Dredging Works are complete, oil tankers calling at Westridge Marine Terminal will be able to fill up to 100% of their capacity.

25. The impacts associated with full tankers transiting Burrard Inlet from the Westridge Marine Terminal were not assessed in previous regulatory and environmental assessment processes.

26. Tsleil-Waututh participated extensively in the two rounds of regulatory review processes under the now-repealed *National Energy Board Act*, RSC 1985, c N-7 and the environmental assessment under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 for the Trans Mountain Expansion Project, which were carried out by the National Energy Board ("**NEB**"). Initially, the NEB "scoped out" the impacts of marine shipping from its environmental assessment. Ultimately, the Federal Court of Appeal quashed the initial federal approval of the Trans Mountain Expansion Project, finding that: (i) the NEB "unjustifiably defined the scope of the Project under review not to include Project-related tanker traffic. The unjustified exclusion of marine shipping from the scope of the Project led to successive, unacceptable deficiencies in the Board's report and recommendations;" and (ii) the Crown had breached its duty to consult Tsleil-Waututh and other impacted First Nations. This led to a reconsideration by the NEB in which it determined that the scope of the Project included related tanker traffic.

27. During the above-noted regulatory review process for the Trans Mountain Expansion Project (and related Crown consultation), Tsleil-Waututh was deeply concerned about the impacts of an oil spill in its Territory, including the fate and behaviour of spilled oil, the feasibility of cleaning it up, and its impacts on key species such as salmon and Southern Resident Killer Whales. Tsleil-Waututh filed extensive evidence and argument on those issues.

28. The evidence and argument of all parties – including the proponent Trans Mountain and Tsleil-Waututh – on the potential impacts of marine

shipping, including in relation to an oil spill, were predicated on the above-noted draft restrictions in Traffic Control Zone 2 limiting oil tankers to 80% capacity. As a result, the NEB did not assess the impacts associated with oil tankers filled up to 100% of their full capacity. Its assessment (both initially and in its Reconsideration Report for the Trans Mountain Expansion Project) was based on oil tankers transiting through Burrard Inlet, and ultimately the Salish Sea, from Westridge Marine Terminal only being filled to 80% capacity. Therefore, no regulatory authority has considered increased risks and impacts associated with fully laden tankers.

29. In coming to its reconsidered decision to authorize the Trans Mountain Expansion Project after the initial quashing, the statutory decision-maker (i.e., the Governor in Council) ultimately relied on the NEB's assessment of marine shipping impacts in its Reconsideration Report. As noted, the NEB's assessment was predicated on oil tankers being filled only to 80% of their capacity in light of the draft restrictions at Traffic Control Zone 2.

30. No subsequent regulatory process has ever assessed the potential impacts of marine shipping, including in relation to oil spill risks, of fully-loaded tankers transiting through Burrard Inlet from Westridge Marine Terminal. This includes the process which led to the issuance of the Permit.

31. Moreover, there are no other regulatory processes or authorizations required before tankers fully loaded with oil at Westridge Marine Terminal can then transit westbound through Traffic Control Zone 2 and Burrard Inlet, and out into the Salish Sea.

(c) Tsleil-Waututh's participation in the process leading to the issuance of the Permit and the Regulatory Gap

32. Tsleil-Waututh first received notice of the proposal from the VFPA for the Second Narrows Dredging Works in "early engagement" correspondence on May 13, 2025.

33. The proposal was made in support of the VFPA-as-proponent's application pursuant to s. 27 of the *Port Authorities Operations Regulations* to obtain an authorization from itself – the VFPA-as-decision-maker – to conduct the Second Narrows Dredging Works. In determining whether to issue an authorization, the VFPA-as-decision-maker conducts a Project and Environmental Review Process ("**PER Process**"). The PER Process is divided into Categories A, B, C, and D, which are escalating levels of review depending on the complexity of a project.

34. In this case, the VFPA placed the Second Narrows Dredging Works into Category C of the PER Process, defined as projects that are "generally larger or more complicated," that have "[m]oderate potential for environmental and community impacts," and which anticipate "Indigenous consultation", "public engagement and stakeholder consultation." The VFPA did not carry out the more intensive assessment of the Second Narrows Dredging Works that would have been required pursuant to Category D of the PER Process.

35. Over summer and fall 2025, the VFPA-as-proponent provided various document packages to Tsleil-Waututh containing technical-level information about the Second Narrows Dredging Works, including the scope of the proposed Works, and studies the VFPA conducted about the potential environmental effects of the Works.

36. Tsleil-Waututh reviewed the document packages as they were received from the VFPA. During Tsleil-Waututh's review, it became evident that, just as with the Berry Point Range Light Installation, the VFPA had only scoped its assessments to consider potential environmental effects and impacts to Aboriginal rights associated with the physical act of conducting the Second Narrows Dredging Works, namely, the immediate physical impacts of:

(a) dredging along the edges of the deep-sea navigation channel within the proposed footprint east of the Iron Workers Memorial

Bridge (i.e. within the white polygons shown in the map above at Figure 2);

(b) removal of sections of decommissioned waterlines within the proposed dredging areas; and

(c) the installation of two new aids to navigation.

37. The VFPA's scoping excluded consideration of potential impacts to Tsleil-Waututh's Aboriginal title, rights, culture, and way of life from the expanded marine shipping that the Second Narrows Dredging Works would facilitate – its express purpose as noted in the language of the Permit itself and quoted above at paragraph 14. Impacts excluded from this review, which Tsleil-Waututh brought to the VFPA's attention, include:

(a) the risks of oil tankers loaded to 100% of their capacity (rather than 80%) transiting through Burrard Inlet;

(b) changes in the timing and frequency of tanker traffic;

(c) how changes to marine shipping (i.e., an increased number of daily transit windows and more fully-loaded vessels) will present risks to herring, Killer Whales, and other whale species;

(d) the relationship between more heavily-laden tankers and escort tugboats on vessel wake-related effects such as shoreline erosion (which impede Tsleil-Waututh's ability to access and exercise harvesting and cultural rights);

(e) the impacts of dredging at a known site of significance for Tsleil-Waututh's culture, spirituality, history, and identity;

(f) operational impacts of heavily-laden tankers and escort tugs to adjacent kelp and eel grass beds (which provide nursery stock

for Tsleil-Waututh habitat restoration work and function as habitat for many traditionally-harvested species);

(g) increased instances and intensity of disturbances to cultural and ceremonial practices and harvesting activities (such as wakes impacting crab harvesting practices);

(h) changes to anchorage use; and

(i) predicted or forecasted increases to marine shipping beyond oil tankers, which will be facilitated by the Second Narrows Dredging Works and the other Proposed Initiatives;

(the "**Regulatory Gap**").

38. In light of this, Tsleil-Waututh wrote to the Ministers of Fisheries and Oceans, Transport, Environment and Climate Change, Energy and Natural Resources, and Crown-Indigenous Relations on November 21, 2025 to:

(a) advise Canada of the Regulatory Gap;

(b) put Canada on notice that it was compelled by the honour of the Crown to ensure that the duty to consult was discharged in relation to the Regulatory Gap before the VFPA could lawfully issue the Permit, even if the VFPA itself did not have the statutory mandate to do so; and

(c) proposed that Tsleil-Waututh and Canada enter into an engagement protocol to establish a parallel process to consult on the Regulatory Gap before the Permit was issued.

39. Canada never responded to Tsleil-Waututh's November 2025 letter.

40. Tsleil-Waututh began raising this matter with VFPA staff soon after the beginning of early engagement. Then, on December 9, 2025, Tsleil-Waututh

also wrote to the VFPA to formally set out its position in relation to the Regulatory Gap. Tsleil-Waututh formally requested that the VFPA expand the scope of its assessment to remedy the issue.

41. On January 23, 2026, the VFPA wrote back to Tsleil-Waututh and explained that, due to the VFPA's perceived limitations of its regulatory jurisdiction, it could not assess issues related to the Regulatory Gap and that it was limited to only assessing the immediate "physical works and activities" associated with the Second Narrows Dredging Works.

42. By March 2026, Tsleil-Waututh had still not heard back from Canada about its November 2025 letter or the Regulatory Gap.

43. On March 23, 2026, Tsleil-Waututh sent a follow-up letter to Canada in which Tsleil-Waututh expressed its concern that the PER Process had been moving along all the while, without Tsleil-Waututh receiving any response from Canada about the Regulatory Gap. Tsleil-Waututh attached a draft engagement protocol to the March 2026 letter for Canada's review, which was very similar to engagement protocols that Tsleil-Waututh and Canada had entered into in the past to guide the initial and re-do of the Phase III consultation processes for the Trans Mountain Expansion Project. Tsleil-Waututh specifically tailored this engagement protocol to address the Regulatory Gap (both from the Second Narrows Dredging Works and the other Proposed Initiatives), by proposing that the parties commit to discuss:

(a) how the Proposed Initiatives will increase or otherwise affect marine shipping in Burrard Inlet, including, without limitation, changes to the number of vessel transits, the types of vessels transiting, and the volumes of oil they will be shipping;

(b) how Tsleil-Waututh's Aboriginal title, rights, culture, and way of life, may be impacted depending on the results of (a);

(c) how dredging may impact Tsleil-Waututh's sacred connection to Burrard Inlet;

(d) potential mitigation or accommodation measures to address or compensate for: (i) potential impacts of the Proposed Initiatives; and (ii) the use of Tsleil-Waututh Territory for the Proposed Initiatives;

(e) Canada's broad interests in sustainably and responsibly developing Canada's natural resources and other public policy objectives related to greater economic independence of the country;

(f) implications of the potential approval of the Proposed Initiatives on: (i) Tsleil-Waututh and its members; (ii) the relationship between Tsleil-Waututh and Canada; (iii) future development in Burrard Inlet; and (iv) Burrard Inlet's ecosystem and Tsleil-Waututh's ongoing efforts to remediate the cumulative effects of industrial development on Burrard Inlet;

(g) implications of the potential rejection of approvals for the Proposed Initiatives; and

(h) any other matters that the parties may agree to discuss.

44. After sending the March 2026 follow-up letter to Canada, Tsleil-Waututh wrote to the VFPA on April 2, 2026 to request that the VFPA adjourn its regulatory process to allow Canada time to discharge the duty to consult in relation to the Regulatory Gap. In an April 14, 2026 letter, the VFPA rejected Tsleil-Waututh's adjournment request and took the position that Tsleil-Waututh's concerns about marine shipping would be dealt with by the Canada Energy Regulator as the "lifecycle regulator" for the Trans Mountain Pipeline System.

45. As of the date of the filing of this judicial review, there is no application before the Canada Energy Regulator which would involve any assessment of marine shipping that would close or in any way address the Regulatory Gap, including what the Second Narrows Dredging Works will enable: tankers filled up to 100% of their capacity at the Westridge Marine Terminal transiting through Second Narrows, Burrard Inlet and, ultimately, the Salish Sea, as well as other shipping efficiencies in the area, such as allowing transit through the Second Narrows area at different frequencies and times.

46. On June 5, 2026, the Canada Energy Regulator issued an authorization for Trans Mountain to inject drag reducing agent into its pipelines. In its reasons for decision, the Canada Energy Regulator explicitly noted that no marine shipping assessment was conducted or required because the "application did not include – and this letter decision does not approve – any new facilities or changes to the operational capacity of the Westridge Marine Terminal. If Trans Mountain wishes in the future to modify or expand the Westridge Marine Terminal it would be required to apply to the Commission to do so."

47. There is therefore no regulatory process which has assessed or will assess marine shipping impacts from oil tankers loaded up to 100% of their capacity transiting through Traffic Control Zone 2 and Burrard Inlet and into the Salish Sea.

48. Around this time, on April 10, 2026, Tsleil-Waututh also wrote to the VFPA upon becoming aware that the VFPA-as-proponent had posted a request for proposals for the prime contractor of the Second Narrows Dredging Works, with a closing date of April 20, 2026 – in the middle of its engagement with Tsleil-Waututh on this matter and well before the Permit was issued. Tsleil-Waututh asked the VFPA to pause the request for proposals process on the basis that it was premature, and should not go ahead until: (i) the Regulatory Gap was addressed; and (ii) the conclusion of parallel discussions between Tsleil-Waututh and the Department of Fisheries and Oceans which could lead

to further mitigation measures being imposed as conditions on the Second Narrows Dredging Works, thereby informing the scope of the work to which a request for proposals would relate. The VFPA rejected that request in a short April 13, 2026 e-mail, saying that it was the VFPA's "standard practice to go out for procurement in parallel with regulatory processes."

49. Throughout the timeline described above, and up until the Permit was issued on June 23, 2026, Tsleil-Waututh continued to work with the VFPA in good faith on mitigation matters related to the immediate physical impacts of conducting the Second Narrows Dredging Works. Tsleil-Waututh made clear that: (i) it was maintaining its position that the Regulatory Gap needed to be addressed before the Permit could be lawfully issued; and (ii) Tsleil-Waututh's good faith participation in the process as-scoped by VFPA was without prejudice to that position.

50. In addition to Tsleil-Waututh providing comments on mitigation matters thought to be "in-scope" by the VFPA, Tsleil-Waututh and the VFPA periodically exchanged letters respecting the Regulatory Gap, without resolution. Tsleil-Waututh sent letters to senior staff at the VFPA and various federal departments on April 27 and May 26, 2026 requesting meetings to find a path forward to close the Regulatory Gap (including to discuss Tsleil-Waututh's draft of the above-noted engagement protocol). No such meetings occurred as part of consultation in advance of the issuance of the Permit.

51. By the close of the VFPA's process in June 2026:

(a) Tsleil-Waututh maintained its position that the Regulatory Gap needed to be addressed before the Permit could be issued;

(b) the VFPA maintained its position that issues related to the Regulatory Gap were outside of its statutory mandate to address; and

(c) Canada had still not responded to Tsleil-Waututh's November 2025 or March 2026 letters putting Canada on notice of the Regulatory Gap and proposing solutions to address it.

(d) The Permit

52. The VFPA issued the Permit on June 23, 2026. The Permit:

(a) contains conditions and mitigation measures that address only the physical construction of the Second Narrows Dredging Works; and

(b) does not address the Regulatory Gap.

53. The end of the Permit contains a brief "Project and Environmental Review decision," which appears in part to explain the VFPA's determination under s. 82 of the *Impact Assessment Act*, though that is not specified. This part of the Permit notes that the VFPA "has considered any adverse impact that the Project may have on the rights of Indigenous peoples ... We conclude that with the implementation of proposed mitigation measures and Permit conditions, the Project is not likely to cause significant adverse environmental effects. The [VFPA] concludes that the Project has appropriately addressed all identified concerns subject to conformance with the project and environmental conditions in the Permit."

54. When Tsleil-Waututh received the Permit on June 23, 2026, it was accompanied by a document authored by the VFPA entitled "Project and Environmental Review Report" (the "**PER Report**"). The PER Report is dated June 16, 2026, but Tsleil-Waututh did not receive it until June 23, 2026 along with the Permit. The VFPA did not invite Tsleil-Waututh to review or comment on any drafts of the PER Report. The PER Report is described as providing information and analysis to inform the VFPA's decision-making, including draft proposed conditions. It contains summaries of the regulatory process, a project description, summaries of stakeholder and Indigenous consultation, an

environmental effects assessment (scoped only to include effects related to the physical act of conducting the Second Narrows Dredging Works), and a recommendation to issue the Permit.

55. The Indigenous consultation summaries are not broken down on a nation-by-nation basis and are high-level. In this section of the PER Report there is a brief reference in a summary table to "Concerns regarding potential increase to marine shipping in Burrard Inlet." The reference does not:

(a) attribute these concerns to Tsleil-Waututh;

(b) describe the extent of Tsleil-Waututh's concerns or its efforts to raise or close the Regulatory Gap;

(c) provide the decision-maker any indication of the substantive issues Tsleil-Waututh raised about the Regulatory Gap – for example, the fact that no regulator has assessed the implications of fully-loaded tankers (rather than tankers loaded to 80% of their capacity) transiting through Burrard Inlet; or

(d) address any issues related to the contribution of the Second Narrows Dredging Works to the cumulative impacts Tsleil-Waututh is already experiencing.

56. This section of the PER Report merely states that "[a]ny increase in the Trans Mountain Project's capacity (i.e. marina (*sic*) shipping and other activities) is regulated by the Canada Energy Regulator" and that the Permit, if granted, "will not enable a change to any port authority vessel transiting procedures without...additional regulatory processes."

57. The additional processes referred to ((i) a Navigation Risk Assessment undertaken by the Pacific Pilotage Authority and BC Coast Pilots, and (ii) a change to the Port Information Guide's practices and procedures pursuant to s. 57 of the *Canada Marine Act*) will not address the Regulatory Gap. Those

processes will merely involve developing new or additional navigational guidance for those in control of vessels resulting from the Second Narrows Dredging Works, not assessing or considering the marine shipping impacts associated with the transit through Traffic Control Zone 2 and Burrard Inlet of oil tankers filled to 100% of their capacity. It is equivalent to: (i) widening a highway in an ecologically sensitive area; and then (ii) afterward, setting speed limits for the highway. The relevant process to assess impacts to Aboriginal rights and environmental impacts is the former, not the latter.

58. Further, the VFPA has specifically represented to Tsleil-Waututh in the past that: (i) Navigation Risk Assessments are a "pilot-led" process focused exclusively on "pilot safety and navigational issues" to determine "whether the proposed change to navigation procedures meets with pilot navigation safety requirements;" and (ii) the process of changing the Port Information Guide's practices and procedures relates only to "changing existing traffic control procedures." Neither process involves assessing environmental effects or impacts to Aboriginal title, rights, culture, or way of life.

59. The PER Report also includes section "8. Environmental effects assessment." It is described as fulfilling the responsibilities of the VFPA to determine the significance of the environmental effects of the Second Narrows Dredging Works in light of the VFPA's mandate under s. 81 of the *Impact Assessment Act*. The conclusion of the effects assessment is that "the Project is not likely to result in significant adverse environmental effects." However, in line with its approach to the process overall, the VFPA's effects assessment:

(a) only considers the potential effects of the actual physical construction of the Second Narrows Dredging Works in coming to this conclusion;

(b) fails to assess impacts associated with the transit of oil tankers filled to 100% of their capacity transiting through Traffic Control Zone 2 and Burrard Inlet; and

(c) does not take into account how the Second Narrows Dredging Works will contribute to the existing cumulative impacts of industrial development in Tsleil-Waututh Territory and will therefore impact Tsleil-Waututh's title, rights, culture, and way of life. Instead, without elaboration, the PER Report says that the VFPA's assessment "considers the influence of past and ongoing activities on existing conditions," but says that "historic cumulative effects cannot be addressed on a project-by-project basis and are best addressed at the existing tables between the Nation [presumably a reference to Tsleil-Waututh] and Canada."

60. In the PER Report, the VFPA explains that the Second Narrows Dredging Works is scheduled to occur between September 2026 and February 2027. However, condition 34 of the Permit itself indicates that work can begin as early as August 16, 2026, or even earlier with the approval of the VFPA or the Department of Fisheries and Oceans.

61. Concurrently with the Permit, the Department of Fisheries and Oceans issued an authorization under the *Fisheries Act* allowing the VFPA to harm or destroy fish and fish habitat in conducting the Second Narrows Dredging Works. Tsleil-Waututh will be seeking: (i) judicial review of that authorization by way of a separate notice of application; and (ii) to consolidate that judicial review with this proceeding in light of the overlapping issues and parties.

(e) Breach of the duty to consult – failure to close the Regulatory Gap

62. Canada owed Tsleil-Waututh a duty to consult, which it breached in the circumstances. Canada and the VFPA were aware of Tsleil-Waututh's strong claim to Aboriginal title and rights in its Territory, inclusive of the area in which the Second Narrows Dredging Works will be conducted, and the issuance of the Permit has the potential to adversely affect Tsleil-Waututh's Aboriginal title, rights, culture, and way of life, including in relation to the Regulatory Gap. In such circumstances, where a claim is "particularly strong", Canada was obliged

to take "appropriate care ... to preserve the Aboriginal interest pending final resolution of the claim:" *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 91.

63. In 2021, Parliament enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 4, which, *inter alia*, "affirm[s] the Declaration as a universal international human rights instrument with application in Canadian law." Article 32(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* provides that: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."

64. While Canada may rely on steps undertaken by a regulatory body (such as the VFPA) to fulfil its duty to consult, Canada always holds the ultimate responsibility for ensuring consultation is adequate. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, Canada must take further measures to meet its duty, either on a case-by-case basis or more systematically through legislative or regulatory amendments. Further case-by-case measures may include Canada making submissions to the regulatory body, requesting reconsideration of a decision, or seeking postponement in order to carry out further consultation in a separate process before the decision is rendered: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 ("***Clyde River***") at para. 22.

65. Once the VFPA confirmed that it would not be addressing the Regulatory Gap on the basis that it was outside its mandate to do so, Canada was duty-bound by the honour of the Crown to address and close the Regulatory Gap.

66. Canada failed to take any steps to close the Regulatory Gap, and did not even respond to either of Tsleil-Waututh's letters raising the issue and proposing solutions.

67. Further, it is no answer to a breach of the duty to consult in relation to the Permit before this Court for the VFPA or Canada to point to some future, yet-to-be-announced regulatory process that may potentially look at impacts to marine shipping, when:

(a) there are known, concrete, marine shipping-related impacts that will be visited upon Tsleil-Waututh as a result of the Permit; and

(b) Proposed Initiatives continue to be authorized, building momentum toward project approval in future processes.

68. This is a further, independent ground on which Canada breached the honour of the Crown. This approach is contrary to the principle that "meaningful consultation must be timely consultation," and that consultation may arise "in advance of preliminary decisions if a clear momentum to move forward would arise:" *Gitxaala Nation v Canada (Transport, Infrastructure, and Communities)*, 2012 FC 1336 at para. 40; *Sambaa K'e Dene Band v Duncan*, 2012 FC 204 at paras. 164-166.

69. This is a case of "clear momentum." The net effect of the Proposed Initiatives will be to enable Trans Mountain to ship an additional 300-360,000 barrels per day of oil through the heart of Tsleil-Waututh Territory. The Crown has failed entirely to proactively explain to Tsleil-Waututh where the marine shipping-related impacts of this increase will be assessed, contrary to the informational requirements of the duty to consult: *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 at para. 28. As more Proposed Initiatives are authorized, greater momentum will build toward authorizing the remaining ones, risking the consultation in subsequent processes being nothing more than an opportunity to blow off steam before authorizations are

granted: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 54.

70. The Permit was issued on the basis of inadequate consultation for the reasons described above. It is not in compliance with the duty to consult, which is a constitutional imperative. The Permit should be quashed: *Clyde River* at para. 24.

71. While Canada did not even meet the floor of consultation at common law in light of its failure to close the Regulatory Gap, it also held heightened obligations – that it failed to discharge – to design a process geared from the outset at a mutually accepted arrangement: *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at para. 130; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, s 4 and Annex, Article 19.

(f) Unreasonable interpretation of the *Impact Assessment Act*

72. The Permit is also unreasonable, and can be quashed on this separate and independent ground. The VFPA-as-decision-maker unreasonably concluded that the Second Narrows Dredging Works is "not likely to result in significant adverse environmental effects." Accordingly, the VFPA failed to comply with its statutory mandate under s. 82 of the *Impact Assessment Act*. Section 82 directs that a federal authority such as the VFPA "must not ... exercise any power ... under any Act of Parliament other than this Act ... that could permit a project to be carried out ... on federal lands ... unless" the authority has determined it is not likely to cause significant adverse environmental effects (or such effects have been determined by the Governor in Council to be justified in the circumstances).

73. In particular, in coming to its determination under s. 82, s. 84(1)(a) of the *Impact Assessment Act* required the VFPA to consider "any adverse impact

that the project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."

74. The VFPA failed to consider the adverse cumulative impacts that the Second Narrows Dredging Works – even as-scoped by the VFPA – would visit upon Tsleil-Waututh's Aboriginal title, rights, culture, and way of life.

75. A passing remark in the PER Report that cumulative impacts were considered does not meet the reasonableness standard when viewed in the context of the dire state of cumulative effects on Tsleil-Waututh Territory. The PER Report did not grapple with Tsleil-Waututh's submissions that the VFPA was required to take into account the following when it was determining the impacts to Tsleil-Waututh's rights of the Second Narrows Dredging Works:

(a) the cumulative impacts from changes to marine shipping in Burrard Inlet, which are as, or more severe, than anywhere else on the south coast of B.C.;

(b) the importance of Second Narrows as a unique tidal surge ecosystem and migration corridor for all species transiting to Eastern Burrard Inlet;

(c) the connection between potential impacts of the Second Narrows Dredging Works and Tsleil-Waututh's traditional, current, and desired future use of food, social, and ceremonial fisheries; or

(d) the impacts to the cultural health of Tsleil-Waututh from the physical act of dredging in an area of deep cultural importance to Tsleil-Waututh, including the sacredness of the sediment of Burrard Inlet to Tsleil-Waututh.

76. It is unreasonable to conclude that the impact assessment under s. 82 can exclude a substantive consideration of cumulative impacts, especially when read in light of the obligation under s. 6(2) of the *Impact Assessment Act*

that "federal authorities" such as the VFPA "**must** exercise their powers in a manner that ... considers the **cumulative effects** of physical activities" (emphasis added). Relevant policy documents support this interpretation. In *Projects on federal lands and outside Canada – Guidance document on Sections 81 to 91 of the Impact Assessment Act*, under the heading "Impacts on Indigenous Peoples," it is directed that "[i]n making an environmental effects determination, as a best practice, authorities should also consider the potential for cumulative effects. While an individual project may not result in significant adverse environmental effects, it is possible that cumulative environmental effects may result from that project in combination with the environmental effects of other activities that have been, or will be, carried out." Here, Tsleil-Waututh put the VFPA on notice of such "other activities" that will be carried out that will cause cumulative impacts alongside the Second Narrows Dredging Works, and the VFPA failed to consider them in its assessment.

77. The combined effect of ss. 6(2) and 84(1)(a) of the *Impact Assessment Act* legally bound the VFPA to consider cumulative effects in its s. 81 assessment, and the VFPA unreasonably failed to do so.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIALS:

(a) the affidavit of Leah George-Wilson, to be affirmed;

(b) the affidavit of Chloe Hartley, to be affirmed; and

(c) such further and other evidence as counsel may advise and this Court may permit.

The Applicant requests, pursuant to Rule 317(2) that the VFPA send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the VFPA to the Applicant and to the Registry:

1. All material that was before the VFPA or that it considered or relied on in issuing the Permit.

July 8, 2026

AIRD & BERLIS LLP
Barristers and Solicitors
701 West Georgia Street, Suite 1420
Vancouver BC V7Y 1E4

Scott A. Smith
Tel: (778) 371-2243
Email: ssmith@airdberlis.com

Keith Brown
Tel: (778) 371-2248
Email: kbrown@airdberlis.com

Alexander DeParde
Tel: (416) 865-3080
Email: adeparde@airdberlis.com

Lauren Wortsman
Tel: (416) 637-7561
Email: lwortsman@airdberlis.com

Counsel for the Applicant,
Tsleil-Waututh Nation